United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1326

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JERE BISHOP, HARVEY BLOW, JOHN KASPER, MARVIN GREGORY, WILLIAM MAYER and RICHARD PROVOST, On behalf of themselves and all others similarly situated,
Plaintiffs-Appellants

v.

R. KENT STONEMAN, Commissioner of Corrections of the State of Vermont and JULIUS V. MOEYKENS, Warden, Vermont State Prison,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

BRIEF OF DEFENDANTS-APPELLEES

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FOR THE SECOND CIRCUIT

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v.	)	Docket No. 74-1326
R. KENT STONEMAN, Commissioner of Corrections of the State of Vermont and JULIUS V. MOEYKENS, Warden, Vermont State Prison, Defendants-Appellees	)	

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Court below used the proper standard to determine whether Plaintiffs' complaint failed to state a claim under 42 U.S.C. 1983.

2. Whether the District Court correctly held that the Plaintiff's allegations did not rise to the level of a claim actionable under 42 U.S.C. 1983.

3. Whether the Plaintiffs' complaint failed to allege any severe and obvious injuries sufficient to sustain a claim under 42 U.S.C. 1983.

STATEMENT OF THE CASE

This Civil Rights action was filed June 4, 1973, in the United States District Court, District of Vermont by six State prisoners residing at the Vermont State Prison against the Vermont Commissioner of Corrections and the Warden of the Vermont State Prison. In their complaints, Plaintiffs challenged the adequacy of medical treatment at

the prison and attempted to maintain the suit as a class action. Plaintiffs sought preliminary and permanent injunctions ordering Defendants to provide "essential, proper and adequate medical treatment" and to institute "a program to improve the medical facilities at the Vermont State Prison."

The District Court, Holden, C.J., refused to approve the forma pauperis petition of three of the named Plaintiffs (Blow, Gregory and Provost) on the grounds that they were no longer incarcerated and thus lacked standing to sue. Chief Judge Holden did approve the forma pauperis petitions of the remaining three Plaintiffs (Bishop, Kasper and Mayer), and the action continued on behalf of these three presently incarcerated Plaintiffs.

Defendants moved to dismiss the complaint for failure to state a claim on June 26. Hearing was held on this motion on September 20, 1973. On October 2, Joseph DiLaura moved to intervene in the action as a party Plaintiff. Hearing on this motion was held October 30. On December 31, the District Court, Coffrin, J., entered its Opinion and Order denying the motion to intervene and granting Defendants' motion to dismiss. Plaintiffs filed their notice of appeal to this Court on January 14, 1973.

ARGUMENT

I. THE COURT BELOW USED THE PROPER STANDARD TO DETERMINE WHETHER PLAINTIFFS' COMPLAINT FAILED TO STATE A CLAIM UNDER 42 U.S.C. 1983.

In Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L.Ed.2d 338 (1971), the Supreme Court stated that 42 U.S.C. 1983 is not "intended to apply to all tortious, conspiratorial interferences

with the rights of others". Id. at 101. Rather, the actions of the state must rise to a level that elevates the Plaintiffs's complaint to a "constitutional" question if 1983 is to be properly invoked. If the activity complained of by the Plaintiffs constitutes mere negligent professional activity, then the proper forum for relief is the state court (e.g. Nettles v. Rundale, 453 F.2d 899 (3d Cir. 1971)). The present case is thus not an instance in which the Federal court's decision not to assume jurisdiction would bar the plaintiff from a remedy, since Vermont State courts routinely hear medical malpractice suits. Largess v. Tatem, 130 Vt. 271, 291 A.2d 398 (1972); LaRocque v. LaMarche, 130 Vt. 311, 292 A.2d 259 (1972).

The recognition that the decision in this case does not foreclose to Plaintiffs other means of pursuing their claims is explicit in the Order of the District Court. Appendix at pp. 30-31. What the District Court Opinion does recognize is that:

> "The prisoner's right is to medical care and not the type or scope which he personally desires. A difference of opinion between a physician and patient does not give rise to a constitutional right or sustain a claim under 1983" (citations omitted). U.S. ex rel. Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970).

In short, "second guessing" the doctor is not permitted in a 1983 action. Mayfield v. Craven, 299 F. Supp. 1111 (E.D. Cal. 1969) cited in U.S. ex rel. Hyde v. McGinnis, supra. As the District Court aptly recognized, the Plaintiffs make no claim that medical treatment was denied them. Instead, they question the speed and degree of care offered and dispute the professional judgments made. Appendix at pp. 24, 28, 29.

Clearly, a prisoner does not lose all his rights upon incarceration, and at some point the inadequacy of medical treatment in a correc-

tional setting will rise to the level of an unconstitutional deprivation within the scope of the Civil Rights Act. Martinez v. Mancusi, 443 F.2d 921, 923 (2d Cir. 1970).

The problem faced by any District Court in a prison medical care case, of course, is to determine whether the allegations presented justify further judicial attention and intervention under 42 U.S.C. 1983. This Circuit Court has often been asked to review determinations of District Courts in this regard in recent years. As a result, this Court has developed standards for evaluating these claims. Those standards were best outlined in Church v. Hegstrom:

> "Whether a complaint claiming failure to provide medical care is deemed to allege a denial of Fourteenth Amendment rights, or cruel and unusual punishment violating the Eighth Amendment, it must suggest the possibility of some 'conduct that shocks the conscience', or 'barbarous act'. (citations omitted.) 416 F.2d 449 at 450-51 (2d Cir. 1969).

This Court went on to declare that a remedy under the Civil Rights Act would not be available for mere negligence in either administering or failing to supply medical treatment. Id. at 451.

The distinction between conduct which is "barbarous" or "shocks the conscience" on the one hand and "mere negligence" on the other is further defined in subsequent cases decided by this Court. An inmate's dissatisfaction with the professional judgment of the treating physician was held insufficient as the basis for relief under the Civil Rights Act in U.S. ex rel. Hyde v. McGinnis, supra. It was said that a cause of action was warranted not for dissatisfaction regarding the medical judgment exercised, but rather for "a willful refusal to treat a known ailment, resulting in considerable pain and injury". Id. at 867.

Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970), cert. denied,

401 U.S. 983, 91 S. Ct. 1202, 28 L.Ed.2d 335 (1971) reaffirms the distinction between mere negligence and "shocking" conduct. In that case, this Court properly reversed the District Court's dismissal for failure to state a claim. Defendant State officials had ordered an inmate with infantile paralysis who had just undergone surgery on his leg to return to prison in direct defiance of the instructions of the civilian surgeons who operated on him that he should remain flat on his back in bed with pain killing medication. What was worse, the officers involved handcuffed plaintiff and forced him to walk out of the hospital. The Defendant Warden claimed that transfer from the civilian hospital was merely negligent. This Court rejected this argument because it was clear that the Warden had previously been apprised of the delicacy of this operation. His failure to inform himself of Plaintiff's medical needs exhibited "deliberate indifference" if proven. Id. at 924. The difference between the allegations in Martinez and the instant case is obvious.

Nowhere, however, in the cases is "deliberate indifference" to an inmate's "essential" medical needs as exhibited in Martinez equated with mere claim of failure to provide adequate medical treatment or a dispute about medical judgment. This distinction, of course, lies at the heart of the controversy at bar. This Court has upheld claims founded on "deliberate indifference" only in situations, like Martinez v. Mancusi, supra where the complaint portrays a situation in which prison administrators or medical personnel have known or have had reason to know of an inmate's medical needs and have deliberately and intentionally refused to meet such needs. Corby v. Conboy, 451 F.2d 251, 254 (2d

Cir. 1972); U.S. ex rel. Hyde v. McGinnis, supra at 867. Mere delay in providing medical treatment is not synonymous with deliberate indifference. Moreover, the inmate's medical needs must be of an essential nature, such that the actions of the administrators result in severe injuries to the inmates. Martinez v. Mancusi, supra; U.S. ex rel. Hyde v. McGinnis, supra.

Thus, a physician's failure to treat an alleged symptom might represent either a reasonable or negligent exercise of professional judgment (neither of which is actionable under 1983). If the resulting injury is not deemed serious, there are strong policy grounds for the court's focus on the extent of the resulting injuries. Given the unique nature of the environment in a maximum security facility where some inmates are incorrigible and would exploit for their own ends any mechanism designed to serve them, it is not unreasonable to assume that prison physicians may be routinely bombarded with complaints by inmates of illness or physical discomfort. Wolff v. McDonnell, ____ U.S. ____, ___ S. Ct. __, ____ L.Ed.____. (June 26, 1974).

To elevate every disgruntled inmate's complaint that medical treatment was not provided into an action cognizable in the Federal courts under the Civil Rights Acts would be to flood these courts with claims which would be actionable only as ordinary negligence suits had the alleged mistreatments occurred outside the institution. While the Federal courts have been aware of the need to protect inmates against unconstitutional deprivations (Corby v. Conboy, supra; Martinez v. Mancusi, supra), the significant deprivations toward which the Civil Rights Acts are focused are, in this area, evident only with severe

deficiencies in the quality of medical treatment provided by the institution. Moreover, such deficiencies, at least regarding allegations of lack of care, are evident only when serious injuries result. This Court, in Church v. Hegstrom, supra, was apparently aware of the problems inherent in expanding Federal jurisdiction to those claims of failure to provide medical treatment which do not result in serious injuries when it declared:

> "This complaint, even as amended, would allege only that the Defendants knew of Church's illness and intentionally stood by, doing nothing. Such an allegation fails to set forth any facts sufficient to bring it within the patterns of conduct for which relief may be provided under 1983." 416 F.2d at 450.

The court, having found that Plaintiff's complaint there suggested "at most a possible breach of a duty of care through culpable omission", Id. at 451, thus affirmed the District Court's dismissal of the complaint.

Appellants, in their brief, contend that the District Court erroneously applied a two-part standard in evaluating their complaint and required them to satisfy both parts. A careful examination of Judge Coffrin's Opinion reveals that this is simply not so. In fact, the District Court examined Plaintiffs' complaint from every available legal direction in its search to ascertain whether in someway it might state a viable 1983 claim within the single and consistent standard this Court has so often discussed. After the Court engaged in this painstaking analysis, it could only conclude that this complaint, however viewed, did not pass muster. Appendix at pp. 25-29.

More specifically, Judge Coffrin first examined the complaint in toto to see what it revealed factually. He found no claim of denial

of medical care but rather alleged delays in providing treatment, delays in seeing the doctor, ineffective treatment and failure to advise of the results of the medical tests. Appendix at 25. He also recognized that each alleged incident should be considered alone to determine if it individually might rise to the level of a 1983 claim. Appendix at 25.

In evaluating the complaint in both of the aforementioned ways, he applied the accepted "shocking" and "barbarous" standards espoused by this court. Appendix at pp. 26-28. He found that either individually or in toto the allegations failed to state a 1983 claim. Appendix at pp. 27, 28.

Plaintiffs now argue that the District Court articulated two standards, the "shocking and barbarous conduct" rule and the so-called "deliberate indifference" rule and required Plaintiffs to satisfy both. Appellants' brief, p.4. This is incorrect for several reasons and the cases Plaintiffs cite (Martinez v. Mancusi, supra and Corby v. Conboy, supra) do not stand for the proposition claimed. First, there are not two rules. This Court recognized that fact in Martinez v. Mancusi, when it said:

> "Martinez' allegations in this case meet the criteria of Hegstrom and Hyde for. . .a cause of action under the Civil Rights Act" (emphasis added). Id. at 924.

Church v. Hegstrom and U.S. ex rel. Hyde v. McGinnis were "shocking" and "barbarous" rule cases. Obviously, what this Court was saying in Martinez, supra was that "deliberate indifference" may be "shocking" within the scope of Hyde and Church. Corby v. Conboy, which Appellants suggest is determinative cites as its sole authority for the alleged

"deliberate indifference" rule Martinez v. Mancusi, supra. We know already what Martinez said about this subject. Martinez v. Mancusi, supra at 924. See Corby v. Conboy, supra at 254.[1] Obviously, there is only one rule and the District Court applied it to the allegations herein.

What the District Court did was to evaluate every possible way, including the allegations of deliberate indifference to requests for treatment, in which the facts alleged might come within the rule set out in Church and Hyde. It concluded that there was no "deliberate indifference" shown by the facts alleged, only delay. Appendix at 29.

Plaintiffs' reliance here on Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972) is also misplaced in another important respect. The plaintiff in Corby drafted a pro se complaint, and the entire decision in the case was largely tied to the proposition that pro se complaints are held "to less stringent standards than formal pleadings drafted by lawyers". Id. at 253. See also, Haines v. Kerner, 404 U.S. 519,

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[1]See also Startz v. Cullen, 468 F.2d 570 (2d Cir. 1972) which cited Martinez v. Mancusi as authority for the holding that:

> "If decision turned on the precise diet afforded Startz since his return from St. Francis Hospital, as might be the case on an application by Startz to a Connecticut Court having general jurisdiction over prisoner complaints, it might be that a hearing would have been required. However, the scope of authority of a federal court is much narrower; it is confined to determining whether the medical treatment of the prisoner is so shocking as to constitute a denial of due process. . .or cruel and unusual punishment. . . ." Id. at 561.

92 S. Ct. 594, 30 L.Ed.2d 652 (1972). That special set of circumstances does not exist in this case.

In sum, the District Court correctly applied the single standard for evaluating 1983 medical claims which this Court has defined and enunciated in numerous cases. U.S. ex rel. Hyde v. McGinnis, supra; Church v. Hegstrom, supra; Martinez v. Mancusi, supra.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE PLAINTIFFS' ALLEGATIONS DID NOT RISE TO THE LEVEL OF A CLAIM ACTIONABLE UNDER 42 U.S.C. 1983.

In reviewing the dismissal of a claim under 12(b)(6) of the Federal Rules of Civil Procedure, the Court of Appeals must consider all allegations of the Plaintiffs as true. Cooper v. Pate, 378 U.S. 546, 84 S. Ct. 1733, 12 L.Ed.2d 1030 (1964); Haezela v. City of Bridgeport, 299 F.Supp. 709 (D.C. Conn. 1969). The allegations advanced by the Plaintiffs in paragraph IV (11-14) of their Complaint (Appendix at p. 3) in and of themselves fail to constitute a cause of action. They designate no severe injury as a result of the alleged inadequate facilities. Section 38 of Paragraph IV (Appendix at 7) charges that the medical treatment afforded the Plaintiffs constitutes cruel and unusual punishment. If that conclusory statement was taken at face value, the Plaintiffs might have a cause of action. However, as has been stated by this Court, "/m/erely designating the claim as falling in a specific category will not save it if in fact the allegations do not satisfy the label applied." U.S. ex rel. Hyde v. McGinnis, supra at 866. The facts as alleged in the complaint must support the claim, and the mere conclusion that this claim falls within a specific category is not sufficient to sustain such a charge. U.S. ex rel. Gittelmacker v. County of Philadelphia,

413 F.2d 87, 87 (3d Cir. 1969). Accordingly, Plaintiffs' factual allegations must be examined in order to ascertain whether they provide an adequate basis for their conclusory charges.

Plaintiff Mayer claims that he failed to see Dr. Krause until 10 days after his initial request (Complaint, paragraph IV, section 32, appendix p. 6). However, Mayer fails to allege that he was not afforded the opportunity to consult other medical personnel beside Dr. Krause during those 10 days. He does not allege that he was intentionally denied treatment or that he suffered any serious injury as a result of the delay in seeing Dr. Krause. As such, his allegations fail to constitute more than negligence in the care he received. Mere negligence, however, does not warrant federal relief. Church v. Hegstrom, supra.

Plaintiff Bishop maintains that he suffered from a back injury and waited six months to see Dr. Krause. He also alleges that he had not been informed of the results of tests taken by Dr. Krause and that he has received no treatment for his back ailment (Complaint, Paragraph IV, Sections 16-17, Appendix at 4). These allegations also reveal, however, that Dr. Krause did examine Bishop and that medical steps were taken to locate the source of his back problem. (Complaint, Paragraph IV, Sections 16-17). The State did not fail to treat a known ailment (it is not even clear that Bishop's back problem was amenable to treatment), nor did any institution personnel act contrary to prior medical instructions. Martinez v. Mancusi, supra. The complaint also fails to allege that the claimed lack of treatment resulted in "considerable pain and injury" (U.S. rel. Hyde v. McGinnis, supra at 867) The most that can fairly be construed from Bishop's complaint is that he did not get

to see Dr. Krause as soon as he wished, and that Dr. Krause did not explain the nature of Bishop's back problem to him. This alleged failure by the State certainly does not constitute conduct so "shocking" or "barbarous" as to call for Federal relief. Startz v. Cullen, supra.

Plaintiff Kasper charges that he was not given an opportunity to see Dr. Kruase until three weeks after his initial request. He claims that he was not examined on his first visit to Dr. Krause and that, after his condition was diagnosed as cirosis of the liver, that he was not given any treatment for this ailment. (Complaint, Paragraph IV, Sections 26-29, Appendix at 5-6). In these same allegations, however, Kasper admits that he saw Dr. Krause, that he was given a course of treatment (vitamins and rest), and that he received several blood tests to determine the extent of his illness. Plaintiff fails to assert that the Defendants intentionally refused to treat him or that he has suffered from any serious physical injury since seeing Dr. Krause (Kasper's loss of weight occurred before he saw Dr. Krause). Thus, Plaintiff's complaint is grounded in his disagreement with the treatment provided him by the prison. As such, Kasper's allegations fail to support an action under 42 U.S.C. 1983. U.S. ex rel. Hyde v. McGinnis, supra.

The court also considered the allegations of Plaintiffs Blow, Gregory and Provost, who were not before the Court insofar as their complaints were indicative of the treatment provided the proposed class. Appendix at 24. That the Court considered each of these complaints in detail is evidenced by its comments about Plaintiff Blow. Appendix at 29.

After what was obviously careful and painstaking consideration of the complaints of the inmate plaintiffs, the Court below was not satisfied that the allegations rose above the level of mere negligence. Appendix at 29. More importantly, however, the Court suffered from "no illusion" in its evaluation of the situation. It was and is close to the problem of prison conditions and prisoner's rights in this rural state. There could be no mistake that in a proper medical care case, the District Court would not hesitate to exercise jurisdiction. Appendix at 30-31. The evaluation of this complaint by the District Court thus should not be disturbed.

III. PLAINTIFFS' COMPLAINT FAILED TO ALLEGE ANY SEVERE AND OBVIOUS INJURIES SUFFICIENT TO SUSTAIN A CLAIM UNDER 42 U.S.C. 1983.

The Court below found that Plaintiffs' Complaint revealed "that they suffered no ill effects or untoward consequences. . .as a result of the medical treatment received or not received". Appendix at 29. The only possible exception was prisoner Blow, who although not a Plaintiff, had his complaints considered in the total evaluation of all claims. Appendix at 24, 27, 29. We know that cases finding a claim actionable under 1983 generally rely on the presence of "severe and obvious injuries". Church v. Hegstrom, supra at 451. See for example Hughs v. Noble, 295 F.2d 495 (5th Cir. 1961) (plaintiff jailed immediately after neck injury in auto accident); Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957) (bullet wound in leg during arrest). Even the case relied upon so heavily by plaintiffs, Martinez v. Mancusi, requires an allegation of "severe and obvious" injuries. Id. at 923. The complaints of prisoner Blow, the most serious of the group, do not

reach this level. The allegations in the complaint show only that Blow was unhappy with his prescribed orthopedic shoe, that he found it painful and believed it was injuring him notwithstanding efforts by the medical attendant to assist him. (Plaintiffs' Complaint, Paragraph IV, Sections 18-23, Appendix at 4-5). The Court below simply was not impressed that Blow's complaint reached the level of "severe and obvious" injuries contemplated in 1983 action. Defendant-Appellees agree.

Finally, Plaintiffs make much in their brief of the District Court's failure to permit intervention of Joseph DiLaura or consider the affidavit of Larry Ellison. It is even suggested that the District Court abused its discretion. Appellants' Brief, pp. 16-17. We know, however, that the Federal courts have broad discretion in dismissing forma pauperis Civil Rights cases by prisoners against their keepers. Conway v. Fugge, 439 F.2d 1397 (1971). Similarly, joinder of parties is a matter within the sound discretion of the trial court. Allied Chemical Corp. v. Strause, Inc., 53 F.R.D. 588; Arrington v. City of Fairfield (C.A. Ala. 1969) 414 F.2d 687. See also U.S. ex rel. Hyde v. McGinnis, supra at n.1.

What the Plaintiffs seem to ignore is that the Court below was not unsympathetic to their pleas. Instead, it simply found that 42 U.S.S. 1983 was not the vehicle for them to properly pursue their cause. In short, the trial court properly perceived that Plaintiffs' case, if anything, is no more than a "negligence action masquerading under the Civil Rights Act". U.S. ex rel. Hyde v. McGinnis, supra at 865.

We also should not forget the admonition of Chief Judge Northrop, of the United States District Court for the District of Maryland, when he said:

"Although it cannot be denied that direct federal judicial intervention has, in recent years, served to remedy the worst examples of retrogressive American penology (as in the infamous Tucker Farm of Arkansas, see Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968)), the time has come to take a careful and critical look at the continued validity of the sweeping interpretation which has caused 1983 to be read as a mandate to federal courts and forces them to accept all but the most patently ridiculous complaints from state prisoners, no matter how hard or how successfully the state has tried to set its own prison house in order." McCray v. Burrell, 367 F. Supp. 1191 (1973).

Given the careful evaluation which this case received below, this Court should not disturb that conclusion.

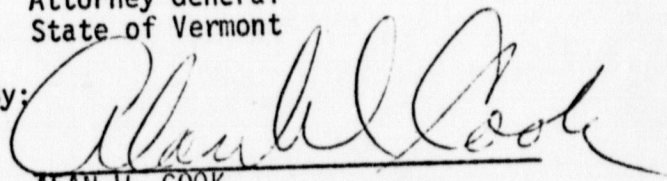
CONCLUSION

THE DECISION OF THE UNITED STATES DISTRICT COURT BELOW SHOULD BE AFFIRMED.

Dated: Montpelier, Vermont
September 9, 1974

Respectfully submitted,

KIMBERLY B. CHENEY
Attorney General
State of Vermont

By: 

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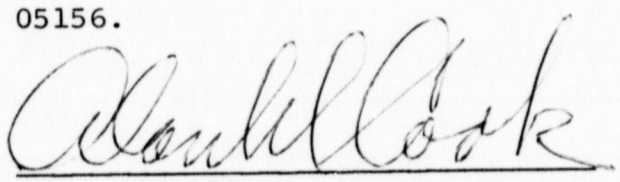
CERTIFICATE OF SERVICE

This is to certify that on the 9th day of September, 1974, I served a copy of Defendants-Appellees' Brief, with a copy of this Certificate appended thereto, on the Plaintiffs-Appellants in this matter, by mailing a true conformed copy thereof in a sealed envelope, first-class postage prepaid to William M. Dorsch, Esq., Vermont Legal Aid, Inc., 3 Summer Street, Springfield, Vermont 05156.



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